

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

IN RE: NEW ENGLAND) MDL NO. 13-02419-FDS
COMPOUNDING)
PHARMACY CASES LITIGATION)
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BEFORE: MAGISTRATE JUDGE JENNIFER C. BOAL

MOTION HEARING

John Joseph Moakley United States Courthouse
Courtroom No. 17
One Courthouse Way
Boston, MA 02210

November 7, 2013
11:30 a.m.

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PROCEEDINGS

THE CLERK: All rise. Today is November 7th, 2013. We're on the record in the matter of New England Compounding Pharmacy Products Liability Litigation. Can I have counsel for the plaintiffs' steering committee please identify yourself and then all parties who are present in the courtroom, please identify yourselves and the parties you represent.

MR. FENNELL: Good afternoon, your Honor, Patrick Fennell from Roanoke, Virginia for the plaintiffs' steering committee.

MS. PARKER: Good morning, your Honor, Kristen Johnson Parker of Hagens, Berman, Sobol, Shapiro for the plaintiffs' steering committee.

MR. GASTEL: Good morning, your Honor, Ben Gastel from Nashville, Tennessee on behalf of the plaintiffs' steering committee.

MS. DOUGHERTY: Good morning, your Honor, Kim Dougherty on behalf of the plaintiffs' steering committee.

MR. TARDIO: Chris Tardio, your Honor, from Nashville, Tennessee on behalf of five separate Tennessee defendants and deponents.

MS. HUMPHREY: Your Honor, I'm Kathryn Humphrey from Michigan. I'm here today on

1 behalf of Southeast Michigan Surgical Hospital.

2 MR. FIALKOW: Good morning, your Honor, I'm
3 David Fialkow. I'm here on behalf of the South Bend
4 Clinic.

5 MR. ALTHAUSER: Good morning, your Honor,
6 Tom Althausen. I'm from Maryland on behalf of Harford
7 County Ambulatory Surgery Center.

8 MS. MARZULLO: Good morning, your Honor,
9 Michelle Marzullo on behalf of Baltimore Pain Management
10 Center.

10:35AM

11 MR. CHRISTIE: Good morning. My name is
12 William Christie from Concord, New Hampshire. We
13 represent Dr. O'Connell's Pain Care Centers.

14 MR. HILLMAN: Good morning. I'm
15 Benjamin Siracusa Hillman, also from Concord,
16 New Hampshire and also representing Dr. O'Connell's Pain
17 Care Centers.

18 MS. WINT: Good morning, your Honor,
19 Cari Wint from Debevoise & Plimpton. We represent
20 Sahara Surgery Center, Surgical Park Center and the
21 Centennial Medical Center.

10:36AM

22 MR. MOYERS: Good morning, Adam Moyers.

23 UNIDENTIFIED SPEAKER ON THE PHONE: I think
24 there may be a problem with the phone connection.

25 THE COURT: For the people on the phone,

1 we've been able to solve, and I thank everyone for their
2 patience here, the great table caper I guess I would
3 call it, when I understand the parties showed up in the
4 courtroom this morning, there were tables missing and
5 apparently microphones as well, so at least for purposes
6 of the introductions, I'm sorry for the people on the
7 phone, but we really don't have enough microphones for
8 all the introducers.

9 I am going to ask when we get to the oral
10:36AM 10 argument, people are welcome to stay seated. I find
11 that makes for a better presentation into the microphone
12 to stay seated, and if you're not able to get to a
13 microphone at the table to go to the podium, so my
14 apologies for those on the phone with respect to the
15 introductions, but hopefully that will be the only part
16 that you will miss.

17 MR. MOYERS: Adam Moyers from Batten, Lee,
18 Raleigh, North Carolina for Surgery Center of Wilson,
19 North Carolina.

10:37AM 20 MS. TAYLOR: Good morning, your Honor,
21 Kiersten Taylor from Brown, Rudnick on behalf of the
22 official committee of unsecured creditors.

23 MR. COREN: Good morning, your Honor,
24 Michael Coren, Cohen, Placitella & Roth from
25 Philadelphia, and I'm here on behalf of the official

1 creditors' committee. I'm one of the co-chairs.

2 THE COURT: All right. And anyone in the
3 back of the room?

4 MS. STEPHENS: Your Honor, my name is
5 Halley Stephens. I'm from Tallahassee, Florida. I
6 represent Pain Consultants of West Florida.

7 MR. KIRBY: Good morning, your Honor,
8 Gregory Kirby from Baltimore, Maryland, and I represent
9 three, The Pain Medicine Specialists, Box Hill Surgery
10 Center and Surgery Center of Bel Air.

11 MR. ABELN: Your Honor, Anthony Abeln from
12 down the street on behalf of Pain Associates of
13 Charleston, LLC.

14 THE COURT: All right. I think that covers
15 everyone in the room who wishes to make appearance. I
16 know that Mr. York already has noted the appearances of
17 those on the phone, so I will not go over that at this
18 time.

19 Since there's so many of you and there's so
20 many filings, what I thought I would do is ask pointed
21 questions initially about the various filings, and
22 obviously at the end, if I've missed anything and anyone
23 wants to add anything, they will be welcome to do so.

24 So let me start with the plaintiffs'
25 steering committee, and the first focus for me, what I'm

1 trying to determine is what is -- there's still a lot
2 left, but I want to be sure I understand what is left.
3 There seem to be, I have three different charts, one
4 from categorizing the different objections and the
5 parties, the nonparties that are objecting, and those
6 are from August 6th, October 16th and November 5th.

7 When I compare the November 5th chart to
8 earlier versions, there are a number of respondents that
9 are no longer listed. Can I assume that either for the
10:39AM 10 entities that are no longer listed that those objections
11 or motions have been resolved or that they are
12 participating in the mediation program?

13 MR. FENNELL: Your Honor, Patrick Fennell
14 for the plaintiffs' steering committee. That is
15 correct. We did remove four healthcare providers from
16 the previous chart and filed the new chart on the 5th.
17 We removed High Point Surgery Center, Premier
18 Orthopaedic and Sports Medicine, Inspira Health Network
19 and Insight Health Corp. because we have resolved the
10:40AM 20 remaining issues with respect to the PSC's subpoena, so
21 those were removed.

22 One other note is we added South Bend Clinic
23 from Indiana onto the chart. They had originally
24 indicated their intention to participate in mediation
25 but then opted out of mediation, so we added them back

1 into the chart.

2 THE COURT: All right. So that was
3 certainly one of my questions about South Bend Clinic.
4 So with respect to the four that you identified, would
5 it be fair for me to deny the objections or motions to
6 quash without prejudice?

7 MR. FENNELL: I think what we have done is I
8 would consider the objections and motions to quash
9 withdrawn, and when we get the production from these
10:40AM 10 clinics, there may be additional issues, but for now all
11 of the motions and objections are withdrawn.

12 THE COURT: All right. With respect to
13 Liberty Industries, there was filing docket Number 321
14 that suggested that the parties had resolved their
15 issues. Is that correct?

16 MR. FENNELL: Liberty Industries is not
17 really one of the healthcare providers that we're here
18 to discuss today. Liberty Industries is one of the
19 national, what we call a national defendant, and
10:41AM 20 truthfully, your Honor, I'm not exactly sure what
21 Liberty's status is right now because I've been focused
22 on the healthcare providers' end of this and not the
23 national defendants.

24 MS. PARKER: I can share with the Court that
25 the subpoena that was issued to Liberty was

1 substantially different in scope and materials requested
2 than the subpoenas that this Court is currently
3 addressing.

4 THE COURT: All right. So it sounds like
5 that entity should not be included in any order that
6 we're discussing or potential order today?

7 MR. FENNELL: That's correct.

8 THE COURT: All right. So are there also
9 entities that are no longer listed in the chart,
10 Erlanger Health System, Carilion Surgery Center, HCA
11 Health Services of Tennessee, Howell Allen Clinic,
12 St. Thomas Outpatient and Doylestown Hospital.

13 MR. FENNELL: Your Honor, I have the chart
14 that was filed two days ago in front of me. I want to
15 make sure that I understand exactly what your Honor is
16 indicating. St. Thomas Outpatient Neurosurgical Center
17 is on that chart.

18 THE COURT: Yes, I see that now. Perhaps it
19 got moved on and off. So it is in for our purposes?

10:42AM 20 MR. FENNELL: Yes.

21 THE COURT: All right.

22 MR. FENNELL: I understand there was a
23 second St. Thomas entity. That is not on the chart, so
24 that was maybe the one your Honor is referring to.
25 Doylestown Hospital has been removed also from the chart

1 as -- and their objections are withdrawn also and motion
2 to quash.

3 THE COURT: The other entities?

4 MR. GASTEL: With respect to the Erlanger
5 and HCA, those subpoenas have been withdrawn, your
6 Honor.

7 THE COURT: All right. I think that just
8 leaves Carilion?

9 MR. FENNELL: Carilion, we have resolved the
10 issues with Carilion, and their objections and motions
11 are withdrawn as well.

12 THE COURT: The last sort of cleanup
13 question, my understanding from docket Number 537 is
14 Premier Orthopaedic withdrew their objections; is that
15 correct?

16 MR. FENNELL: That is correct. We --

17 THE COURT: I'm sorry, you're welcome to
18 finish, and then we'll go to the gentlemen in the back.

19 MR. WOLK: I'm sorry, your Honor, yes,
10:44AM 20 Christopher Wolk from the law office of Jay Blumberg on
21 behalf of Premier Orthopaedics. We did write the Court
22 indicating that we withdrew our objections, however,
23 we'd like the record to reflect that we reserve the
24 right to bring those objections in the future should
25 there be additional subpoenas or requests for production

1 of documents. As to this particular revised subpoena,
2 however, we've come to an agreement with the PSC, and we
3 will start to produce our documents.

4 THE COURT: All right. Thank you. All
5 right. So I'm going to move onto the relevancy
6 objections, and my first question is relevancy as to
7 clinics that have no plaintiff patients, so I had
8 understood that Judge Saylor had already quashed the
9 subpoenas with respect to information pertaining to
10 nonplaintiff patients, but if I'm reading the subpoenas
11 correctly, they still seem to seek information from
12 those clinics where there are no plaintiffs or patients.
13 Is that correct?

14 MR. FENNEL: That's correct, your Honor.
15 Judge Saylor's order quashed the subpoenas insofar as
16 they were requesting protected health information for
17 individual people who were not parties in litigation.
18 The PSC is still seeking information from clinics or
19 healthcare providers which do not have patients involved
20 in litigation or which at least so far don't even have
21 identified injured people, and if I may, your Honor,
22 there's a lot of reasons why the information from these
23 healthcare providers would still be relevant in this
24 case.

25 This is -- I wanted to suggest to the Court

1 that there are really two important factors to consider
2 when discussing the relevance issue. One is that this
3 is not a national health catastrophe involving just one
4 actor, just New England Compounding Pharmacy.

5 There are many other actors involved in
6 this, and without the other actors, in fact, New England
7 Compounding Pharmacy would never have injured anybody,
8 and it never would have killed anybody, so there are
9 other actors involved here. The question is is that the
10 clinics, the recipients of the subpoenas played a role
11 in allowing the catastrophe to happen. Whether their
12 actions were negligent or not, they did participate in a
13 drama that unfolded that led to injured people and
14 deaths.

15 THE COURT: So give me some specifics.
16 That's hard for me. The relevancy argument is hard to
17 follow based on what you just said, right, I understand
18 why NECC is a defendant, but saying that there are many
19 other actors without actually linking them to the
20 defendants currently in the case, I'm not seeing the
21 relevance.

22 MR. FENNELL: Yes, your Honor. In order for
23 the plaintiffs' steering committee or anybody, for that
24 matter, to build a case against New England Compounding
25 Pharmacy, against the insiders and against the

1 affiliates, the plaintiffs' steering committee needs to
2 develop the case, needs to develop a set of facts in
3 terms of proximate cause of the injuries, the negligence
4 that took place at New England Compounding Pharmacy and
5 connect that with injuries and death, so the plaintiffs'
6 steering committee needs to know things like standard
7 operating procedures. We need to know from the clinic
8 side of things --

10:48AM 10 THE COURT: Just so I'm clear about that,
11 you want to learn about standard operating procedures
12 from nondefendants so then you will argue that New
13 England Compounding did not or defendant providers did
14 not follow other standard operating procedures employed
15 by similar entities?

16 MR. FENNELL: We want to know -- if there
17 were standard operating procedures, we want to know what
18 they were. We also need to know in terms of how New
19 England Compounding conducted its business in terms of
10:48AM 20 marketing, we want to know how the various healthcare
21 providers received the drugs, we want to know how the
22 various healthcare providers prepared the drugs for
23 administration to the various patients. We want to know
24 how they procured the drugs, how they stored them, how
25 the whole administration took place from the procurement
of the drug to the point of administration, and the

1 reason this is important information to get from
2 nonparties is because it identifies several things.

3 It identifies a course of conduct on the
4 part of New England Compounding Pharmacy. It identifies
5 potentially, at least, certain things like notice, what
6 did New England Compounding Pharmacy know that these
7 various healthcare providers were doing.

8 It establishes potentially a standard of
9 care that would be applicable to the clinics that are
10:49AM 10 parties to the case in terms of whether or not due
11 diligence, for example, was required, how many of these
12 clinics went back and inspected New England
13 Compounding Pharmacy's premises just to see what type of
14 operation they were running, how many of these
15 pharmacies were required under state law.

16 THE COURT: But why is the inspection by a
17 nondefendant of NECC relevant to the parties in the
18 case?

19 MR. FENNELL: Because it can't, it has the
10:50AM 20 potential, at least, for establishing a standard of
21 care, for one thing. This is the relationship between
22 these healthcare providers, and a compounding pharmacy
23 is not something that has been litigated a lot in the
24 past, this is kind of a unique set of circumstances, and
25 from my own personal experience, I can tell the Court

1 that we're speaking with pharmacists and doctors and
2 asking them what is the standard of care for a
3 physician, for example, who wants to purchase drugs from
4 a compounding pharmacy in these circumstances, and they
5 say, well, we don't know because, Number 1, they're
6 spread out all over the country, and this is not
7 something that's ever been litigated before, so this is
8 something that in order to build a liability case
9 against New England Compounding Pharmacy and the
10 insiders and the affiliates and the other clinics and
11 healthcare providers that are in litigation, we have to
12 have a better understanding of how the process should
13 have worked and also an understanding, a complete
14 understanding of how the process did work.

15 MS. PARKER: Your Honor, I'll add that not
16 all plaintiffs or all victims have filed complaints yet,
17 and there are a variety of reasons for that. One is
18 that the statute of limitations in many states has not
19 run or is not close to running, so there's an
20 understandable reason why some attorneys may have
21 elected not to file former claims.

22 Another reason is that we have this proof of
23 claim deadline in the bankruptcy that's in January.
24 Plaintiffs' attorneys are aware of that. Another is
25 that the MDL process had contemplated that the

1 plaintiffs' steering committee would file a master
2 complaint, which we did yesterday, and that the
3 allegations in that master complaint would be available
4 for plaintiffs to adopt and to incorporate in their own
5 complaints, so having spoken with many plaintiffs'
6 attorneys, we were aware that many of them were waiting
7 for the master complaint to be filed to see what
8 allegations the PSC might propose that then could be
9 adopted by individual plaintiffs.

10:52AM

10 The short form complaints, as currently
11 scheduled, are due to be filed in late November. We do
12 think we'll have a much clearer picture then in terms
13 of -- certainly a clearer picture in terms of which
14 subpoenaed defendants, which subpoenaed healthcare
15 providers are actually going to be named as defendants
16 in this MDL.

10:53AM

17 So that's sort of the reality of where we
18 are today. It's worth noting, I think, that every
19 clinic that has been subpoenaed, including those in
20 front of you, which you're addressing objections,
21 purchased or received contaminated MPA manufactured by
22 New England Compounding Company, at least according to
23 the CDC's list they did.

24 So to prove our case, plaintiffs's cases
25 against NECC --

1 THE COURT: Can I just add with one
2 exception, and you can tell me why this is an exception,
3 I believe that the Neurosurgical Group of Chattanooga
4 claims that it is not on the I don't know if it's the
5 CDC or the FDA list of NECC customers?

6 MR. GASTEL: I'll take that question, your
7 Honor. We are in receipt of documents where a clinic in
8 Chattanooga was informing patients that -- the clinic is
9 named Chattanooga Neurosurgery and Spine, and the
10 Secretary of State's website reveals that that is an
11 assumed name of the Neurosurgical Group of Chattanooga.
12 They were sending letters to patients informing them
13 that they were exposed to an NECC product. That clinic
14 is not on -- neither of those clinics, your Honor, are
15 on the CDC list or the FDA list, which begs the question
16 of where did they get their NECC product if they were
17 sending these letters, and that's why the subpoena was
18 sent to that one entity.

19 THE COURT: All right. Just because this is
20 a very discrete issue, does someone who represents one
21 of those clinics want to speak to that?

22 MR. TARDIO: Ma'am, Chris Tardio on behalf
23 of Chattanooga Neurosurgery and Spine. Chattanooga
24 Neurosurgery and Spine is a physicians group that
25 injects at another site. The physician group did not

10:53AM

10:54AM

1 purchase NECC product. They're in the same position,
2 frankly, your Honor, as Howell Allen, another group that
3 I represent, and Dr. Jones, an individual physician I
4 represent, they did not purchase this product.

5 They were associated with entities that
6 purchased the product, however, these three recipients
7 of the subpoenas did not purchase the product in the
8 order that allowed these subpoenas to be issued, limited
9 it to purchasers of the product, and they similarly are
10 not, so on the discrete issue that your Honor asked
11 about, the Chattanooga Group of Physicians did not
12 purchase.

13 THE COURT: All right. Be rest assured, I'm
14 going to let everyone speak to everything, but in order
15 to keep us moving along, and I know you have something
16 else at 1:30, and so do I, and hopefully we're not going
17 to take that long. Yes.

18 MS. PARKER: Let me be very direct and to
19 the point then in answering your Honor's question as to
20 why the PSC is entitled to information from some of
21 these entities who have not yet been named as
22 defendants. In order for us to prove our case against
23 New England Compounding Company and it's affiliated,
24 what we call the affiliated defendants, which includes
25 Ameridose, Medical Sales Management, Barry Cadden,

1 Lisa Conigliaro Cadden, Doug Conigliaro,
2 Carla Conigliaro and Gregory Conigliaro, we need to know
3 who these clinics spoke with when procuring MPA. Did
4 they speak with, for example, employees of Medical Sales
5 Management or Ameridose, did they speak with employees
6 of New England Compounding Company, what role, if any,
7 did Medical Sales Management play in marketing these
8 products to clinics, were the clinics told by NECC,
9 Ameridose, MSM or any of the individuals that it was
10:56AM 10 okay for the clinics to submit false patient names, were
11 representations made to these clinics about how products
12 should be stored, what procedures needed to be followed
13 in order to ensure or at least enhance the sterility of
14 these products, did NECC make representations to these
15 clinics, NECC or any of the affiliated entities, make
16 representations to these clinics about the quality of
17 their products, about whether NECC was complying with
18 certain USP or other industry guidelines, what did NECC
19 represent about pricing, was NECC or any of the
10:57AM 20 affiliated entities selling their products as an equally
21 high quality but lower priced product?

22 I won't say to this Court that it would be
23 impossible for us to prove the case against NECC or the
24 affiliated defendants without that information, but it
25 is certainly information that is relevant to the

1 plaintiffs' claims in this case.

2 THE COURT: So which are the clinics or
3 healthcare providers that at this time, and if it's
4 easier for you to submit a list afterwards, that's fine,
5 who are not -- who do not have any patients that are
6 either plaintiffs or, as you said, there's some
7 nonplaintiff victims at this point, which clinics are
8 those?

9 MS. PARKER: So as I'm sure your Honor can
10 understand, that list is in flux.

11 THE COURT: I understand. So it would only
12 be what you know at this time?

13 MS. PARKER: That's right. So as of now, I
14 don't have the current list in front of me. There was a
15 conditional transfer order that came through just a few
16 days ago that brought additional plaintiffs here. There
17 also are many instances where plaintiffs' counsel have
18 sent letters of representation or otherwise informed
19 clinics about potential claims of a slightly different
20 bucket, I understand.

21 We would be happy to provide the Court
22 though with a list of those clinics that are currently
23 named understanding that when the short form complaints
24 then come in in November, that list probably changes
25 dramatically.

1 THE COURT: So that would be helpful, if you
2 could provide that. How long do you need to do that?

3 MS. PARKER: Early next week.

4 THE COURT: That would be fine. A week from
5 today?

6 MS. PARKER: Yes, thank you.

7 THE COURT: And I'm going to circle back on
8 the relevancy, I just want to ask the plaintiffs'
9 steering committee all my relevancy questions. The next
10 question is why do you need the insurance policies of
11 nonparties?

10:59AM

12 MR. FENNELL: Your Honor, the plaintiffs'
13 steering committee concedes, I think, that insurance
14 policies in most cases are not discoverable, liability
15 policies are not discoverable unless somebody is a party
16 to a case.

17 The unusual circumstances of this case, we
18 think, call for at least a minimal disclosure of
19 insurance policies for one very good reason, and that is
20 that this is a case where there are many, many injured
21 people and many people who have died. There are very
22 limited assets to resolve these claims, and it would
23 just be in everybody's best interest, we think,
24 to -- for the plaintiffs' steering committee to at least
25 find out what policies are out there in terms of whether

11:00AM

1 those policies are wasting policies or not so that we
2 know if we're engaging in discovery battles over
3 subpoenas with various clinics whether or not we're
4 using up assets for that purpose, so that's at least a
5 limited reason for the plaintiffs' steering committee to
6 know at this point what the nature of these policies
7 are.

8 THE COURT: All right. What about the
9 articles of incorporation for nonparties?

11:00AM 10 MR. FENNELL: The articles of incorporation
11 were requested, your Honor, because I believe we know of
12 some instances in which some clinics or healthcare
13 providers purchased drugs from New England Compounding
14 Pharmacy and then turned around and redistributed those
15 drugs to some related entities, some corporations that
16 it was affiliated with who may not have been direct
17 purchasers from New England Compounding but ultimately
18 ended up obtaining drugs that were manufactured by New
19 England Compounding, so what we're trying to do is get some
11:01AM 20 idea of what the corporate structures are to find out if
21 there are any related entities, parent corporations or
22 otherwise that may have been involved.

23 THE COURT: All right. Then it's sort of a
24 relevancy question, but this is for the Pain Medicine
25 Specialist attorney, is that someone over here? I

1 believe you had made an argument that what you should be
2 limited to in turning over was based on the bankruptcy
3 bench order with respect to patients and plaintiffs, and
4 I wasn't quite following that because it seemed to me
5 that was for a very different purpose, and,
6 unfortunately, I think you're going to have to go over
7 to the other side of the courtroom to the microphone.

8 MR. KIRBY: Your Honor, Greg Kirby.

9 THE COURT: Thank you.

11:02AM

10 MR. KIRBY: I think when I made that
11 argument, it was a while back, and it was before we had
12 entered into a stipulation agreement with the trustee
13 with regards to what information was going to get turned
14 over, so I don't think that really applies.

15 THE COURT: That's still alive?

16 MR. KIRBY: So I apologize.

17 THE COURT: Thank you. That's helpful. So
18 do any of the respondents or parties want to speak to
19 the relevancy issues that I have covered?

11:02AM

20 MS. HUMPHREY: I will, your Honor.

21 THE COURT: That would be great. Perhaps
22 the court reporter doesn't need it, but it would be
23 helpful to me if you could identify yourself again and
24 who you're representing.

25 MS. HUMPHREY: Absolutely. May I sit?

1 THE COURT: Yes, absolutely.

2 MS. HUMPHREY: I am Kathryn Humphrey, and I
3 have one respondent, one deponent, Southeast Michigan
4 Surgical Hospital. It is in that category that you put
5 your finger on, your Honor. We have no patients who are
6 plaintiffs, we have no patients for whom we have
7 received letters of representation from counsel, we have
8 no patients for whom we have received claims, and, most
9 tellingly, we have been told by the Department of Mental
10 Health and the CDC that we have no patients who are
11 being tracked by them as a part of the fungal meningitis
12 outbreak.

11:03AM

13 Now, that's not particularly surprising. My
14 client bought one small lot of I believe it was 25 vials
15 and didn't even use them all. They were not all
16 administered. Most of them were returned, so we're
17 talking about a small number of people, and yet we
18 received a subpoena for all of the things that your
19 Honor sees before you.

11:04AM

20 The answer that you received as to why there
21 is relevance to these sought-after documents is
22 something I would like to speak to quickly. The litany
23 of things that Mr. Fennell gave you -- and maybe
24 Ms. Parker, too -- as to what kinds of things they need
25 to know in order to make their claim, included, it was

1 Ms. Parker, included a host of questions that started
2 with were there representations made as to how to store,
3 what the quality was, whether NECC was complying with
4 the USP requirements, whether this was equally high
5 quality but at a lower price, et cetera.

6 In order for them to prove a case of
7 liability against a defendant, they must show that
8 representations were causally linked to the injury that
9 was caused to a plaintiff, and, therefore, some
10 representation made by NECC to my client can have no
11 logical or legal connection to reliance by and injury to
12 a patient of a different clinic, a different hospital,
13 perhaps in a different part of the country.

14 Nothing that NECC said, whether it was
15 truthful or deceitful, can have any effect on the claims
16 that a plaintiff is making against other defendants, and
17 there are no plaintiffs who are making claims against
18 Southeast Michigan Surgical Hospital, so that is the
19 break in the link, you called it a link, and you were
20 absolutely right, and there is a break here, and that is
21 the problem broadly stated in the relevancy argument.

22 THE COURT: All right. Anyone else want to
23 speak to the relevancy argument? Yes.

24 MS. WINT: Good morning, your Honor,
25 Cari Wint from Debevoise & Plimpton on behalf of

1 Surgical Park and Sahara Surgery Center. Surgery Park
2 and Sahara are actually both in the same position as
3 Southeastern Michigan Surgical Hospital, and we agree
4 completely with what Ms. Humphrey just said, so I will
5 leave that there.

6 I'd like to speak just briefly to point out
7 with regard to Sahara Surgery Center that in addition, I
8 think Sahara is in a unique position because it received
9 only five vials of MPA from one of the tainted lots from
10 NECC. It never opened any of those vials. Those vials
11 actually stayed on the loading dock. They were received
12 I think on a Friday afternoon, and we received the
13 recall notice I believe Monday morning, so those vials
14 were actually shipped back unopened, and that is noted
15 on the CDC list, so in terms of relevance, we think
16 that's a very important point.

17 THE COURT: Thank you. Yes.

18 MR. CHRISTIE: William Christie for
19 Dr. O'Connell's Pain Care Centers. Just very briefly,
20 we agree with Ms. Humphrey's statements, but just so the
21 record is clear, I think there's just a slightly
22 different position for our clinic than many of the
23 nonparties here in that we are a clinic who has no
24 plaintiffs against us, a clinic that did receive product
25 from NECC but a clinic with no plaintiffs against us

1 over a year after these events have unfolded, but the
2 same arguments apply to our clinics as would apply to
3 the more limited scope that Ms. Humphrey spoke about.

4 THE COURT: Thank you. Anyone else? Yes,
5 the gentleman, and then I'll take the lady in the back.

6 MR. FIALKOW: David Fialkow on behalf of
7 South Bend Clinic echoing the point that there are no
8 plaintiffs asserting claims against the South Bend
9 Clinic, and I don't know if this is the appropriate time
10 to address it, address the relevance issue, but it
11 relates to the request that goes to finding out
12 information about purchases from other clinics, not
13 NECC, and so the relevance there is even further
14 removed.

15 This is request or docket Number 2 in the
16 subpoena received, and there's kind of other issues,
17 too, so I'll maybe just speak to the relevance portion
18 of it now, but we're talking about orders by a
19 nondefendant, a nonparty regarding patients that aren't
20 parties from an entity that isn't a party to the case,
21 so the relevance is even further attenuated in that
22 circumstance.

23 THE COURT: All right. Thank you.

24 MS. MARZULLO: Thank you, your Honor,
25 Michelle Marzullo on behalf of Baltimore Pain Management

1 Center, if I could just address the insurance issue
2 briefly. The PSC in what they have presented to you
3 today, and, indeed, what they wrote in response to my
4 center's objections, it appears that they are using the
5 insurance information to determine whether or not to
6 file suit against certain individual clinics. That
7 is -- that's a prejudicial use of the insurance
8 policies, the insurance policies which are nonrelevant
9 to any of the current parties.

11:10AM

10 At least in my case, I have a nonparty
11 objector. There are no known plaintiffs who are clients
12 of my center, so the insurance policies that my center
13 might have or might not have, it should not be used to
14 determine whether or not the PSC or any of the
15 plaintiffs' counsel would choose to file suit, or, well,
16 would choose to file suit against my client.

11:10AM

17 The same goes for the corporate information
18 that they're requesting, and in my reading of the
19 revised subpoena request, it's not just articles of
20 incorporation, but it's also the bylaws that are
21 requested. Again, that information, well, first off,
22 the articles of incorporation, at least in Maryland, are
23 available online, so they can get that themselves. The
24 bylaws, not so much.

25 Again, what is that information going to

1 tell them that is going to determine whether or not they
2 are going to sue my client? To me, that's a prejudicial
3 use of the discovery process. They have also with
4 regard to relevancy, they're asking for information as
5 to nonparty vendors that the nonparty clinics would use
6 that as a substitute or instead of turning to the NECC.

7 Again, where is the relevance of that
8 information? The way I kind of think of it, your Honor,
9 is if I go out today and have lunch down the street here
10 and I get food poisoning and I decide to sue the
11 restaurant, for what reason would I go to the restaurant
12 down the street from my office in Towson, Maryland and
13 ask them for their insurance policies? It makes no
14 sense. Why would I ask the restaurant in Towson where
15 they buy their meat and their bread and their
16 vegetables? It makes no sense for a lawsuit against a
17 Boston restaurant, and so I see that as akin to the
18 conversation that we're having today with regard to
19 these clinics.

20 This Baltimore Pain Management Center in
21 Baltimore, Maryland doesn't have any patients who are
22 currently plaintiffs in this case, so at this point,
23 requests for the insurance documents, our corporate
24 documents, vendor information, it's all irrelevant to
25 the parties in the case that Judge Saylor's order

1 referred to, it just doesn't connect. Thank you.

2 THE COURT: Thank you. Anyone else on
3 relevancy?

4 MS. DOUGHERTY: If I may on behalf of the
5 plaintiffs' steering committee?

6 THE COURT: Yes.

7 MS. DOUGHERTY: Kim Dougherty. I just
8 wanted to, first of all, just respond very briefly to
9 say that to assume that plaintiffs are making a decision
10 whether or not to sue clinics based upon their insurance
11 policies is simply outrageous and offensive. We are
12 pursuing claims on behalf of people that have been
13 injured.

14 We do not look at insurance policies to make
15 that decision. We represent people because they've been
16 wronged here. Whether there's five dollars in insurance
17 or \$20 million in insurance, we are representing our
18 clients to the best of our ability.

19 Moving on from that, your Honor, one thing
20 that I think we need the Court to be aware of is that
21 notices of claims have gone out. Whether they're
22 plaintiffs or not at this point in time, there are folks
23 who just spoke to you telling you that plaintiffs --
24 there are no plaintiffs. They have received letters of
25 representation from this very table, from people sitting

1 right at this table, and so what I would like and what
2 the plaintiffs' steering committee would like is for you
3 also not to order just a list of plaintiffs that are out
4 there, but to order all of the defendants who are
5 subject to these subpoenas to produce a list of patients
6 who have been identified, whether through a letter of
7 representation or notice that has been provided by any
8 lawyer that there's a claim out there, because I can
9 tell you I represent over 100 people, and I have maybe
10 five percent of my clients on file at this point in
11 time, and I think that a lot of other people are
12 similarly situated.

11:14AM

13 Now I can tell you who I've sent letters of
14 representation to, and we can, as the plaintiffs'
15 steering committee, tell you who us seven folks have
16 sent letters of representation to, but there are
17 hundreds of plaintiffs' lawyers out there, and we are
18 not able to capture the identity of every patient and
19 every person who has sent a notice to these facilities,
20 so we ask that you also place the burden on the
21 defendants to identify, self-identify when they have
22 received a letter of representation or a notice of any
23 kind by the same deadline that we have of the 14th.

11:14AM

24 THE COURT: All right. Moving onto the
25 witness fee issue, as I understand, that has largely

1 been resolved. I understand that the PSC, the witness
2 fee is associated with the deposition testimony, and
3 that the PSC is no longer seeking depositions except
4 with respect to entities in Tennessee. Is that correct?

5 MR. FENNELL: That is correct, your Honor,
6 and it is the PSC's intention to pay the fee once a
7 deposition has been scheduled.

8 THE COURT: Am I correct also, and perhaps
9 someone from Tennessee can address this, I don't believe
11:15AM 10 that any of the Tennessee entities objected on the basis
11 of the witness fee issue?

12 MR. GASTEL: I believe that they did
13 initially, your Honor, and then we subsequently tendered
14 new subpoenas that were accompanied with the fee, and I
15 think that objection is functionally withdrawn or
16 mooted.

17 THE COURT: All right.

18 MR. TARDIO: That's correct, your Honor.

19 THE COURT: Thank you. With respect to the
11:16AM 20 scope of the time period for the subpoena, the requested
21 information, I had understood that the PSC reduced the
22 time frame for responsive documents from October 6th,
23 2010 to October 6th, 2012, and I was just wondering how
24 that comports with Judge Saylor's order authorizing
25 discovery from January, 2011 to November, 2012?

1 MR. FENNELL: Your Honor, if I'm not
2 mistaken, the order from Judge Saylor to which you're
3 referring is document 192?

4 THE COURT: Yes.

5 MR. FENNELL: I believe that that time frame
6 that Judge Saylor was addressing in that order
7 specifically applied to protected health information --

8 THE COURT: All right.

9 MR. FENNELL: -- which is an issue that's
10 sort of been mooted at this point because of the rulings
11 subsequent from Judge Saylor and the bankruptcy court
12 action on that point.

13 THE COURT: Thank you. That's helpful.
14 Moving onto confidentiality, and specifically those who
15 raised attorney-client privilege objections, so I don't
16 know who wants to speak to this from the respondents.
17 Why is the -- and also business information, why isn't
18 the protective order that Judge Saylor entered not
19 sufficient to protect any confidential or business
20 information?

21 (No response)

22 THE COURT: All right. I'll move on.

23 Also, anyone who raised an attorney-client
24 privilege or work product objection, I was wondering how
25 they wanted me to evaluate that given that I have no

1 privilege log?

2 (No response)

3 THE COURT: All right. Moving on, I'm going
4 to move to the HIPAA and physician-patient privilege,
5 and some people after or entities after the issuance of
6 the qualified protective order I understand are still
7 maintaining that that order is not sufficient to comply
8 with the HIPAA regulations, so if someone is maintaining
9 that objection, I'd be interested to hear from them why
10 the qualified protective order doesn't satisfy HIPAA. I
11 understand we have a separate physician-patient
12 privilege argument as well.

11:18AM

13 (No response)

14 THE COURT: All right. Moving on to the
15 physician-patient privilege, why isn't that waived with
16 respect to any plaintiff? And to the extent that it's
17 not waived, if I were to order the plaintiffs to sign a
18 waiver, why isn't that sufficient?

19 (No response)

11:19AM

20 THE COURT: I think some parties or
21 respondents had objected based on the time to comply
22 with the subpoena, and my understanding, and perhaps, as
23 you pointed out before this isn't relevant, but
24 Judge Saylor's order as captioned in Docket 192 allowed
25 for 30 days to comply. Was there a reason why someone,

1 if I was to order them to respond to a subpoena, why 30
2 days wouldn't be sufficient? Mr. Christie.

3 MR. CHRISTIE: I would give the Court -- and
4 it would depend obviously on what the Court's order
5 would be, but I could tell from our clinics with the
6 extent of the information that is requested in the
7 various locations, we have two locations and the various
8 disparate places where the extent of this information is
9 requested, with the healthcare practice, it's trying to
10 provide services that 30 days would not be sufficient to
11 comply. Something more like I think 60 days would be
12 more appropriate.

13 THE COURT: All right. Thank you.

14 MR. FENNELL: Your Honor, can I make a
15 suggestion?

16 THE COURT: Yes.

17 MR. FENNELL: The subpoenas have been
18 outstanding since June, and most of the -- I mean, we're
19 approaching, I guess, maybe four months now or even
20 longer, and on top of that, the plaintiffs' steering
21 committee has a deadline approaching of December 2d, I
22 believe, by which we have to file a complaint against
23 New England Compounding, and we would ask the Court if
24 the Court is going to enter an order requiring
25 production pursuant to the subpoenas, as we hope, that

1 the Court put a fairly short time fuse on it given that
2 four months have passed and this upcoming deadline.

3 Now, having said that, we would ask for
4 something like 14 days, but if clinics really have a
5 logistical problem with that, then we would encourage
6 them to contact us, and we can discuss it with them, and
7 we'll be flexible in that regard, but keeping an eye on
8 our deadline coming up for filing the complaint.

9 MS. PARKER: I believe Mr. Fennell misspoke.
10 The deadline for filing the master complaint as to the
11 affiliated defendants is currently set for
12 December 20th.

13 THE COURT: Thank you. If I read the chart
14 correctly, it lists objections that have not been filed
15 with the Court. Is that correct?

16 MR. FENNELL: Yes, that's correct. A few of
17 the objections were actually sent directly to the
18 plaintiffs' steering committee.

19 THE COURT: So you've included them for sake
20 of completeness. Obviously I can't rule on them if
21 they're not performing.

22 MR. FENNELL: Yes, ma'am.

23 THE COURT: Thank you. Now, with respect to
24 burden, I think I've gone through most of the papers,
25 but I may have missed something. I don't believe any

11:21AM

11:21AM

1 clinic provided examples for burden, sort of estimates
2 of time or expense, or did I miss something? On the
3 burden issue as well, I think a number of respondents
4 said that the PSC should get discovery from NECC.
5 Obviously being in bankruptcy raises certain
6 difficulties with respect to discovery, but my
7 understanding is that there's some discovery allowed
8 from NECC, and, therefore, I was wondering what the
9 status of that was?

11:22AM

10 MR. FENNELL: There is, your Honor, an
11 informal arrangement between counsel for the debtor and
12 the plaintiffs' steering committee to obtain a very
13 limited amount of discovery from New England Compounding
14 Center. That comes with a couple of conditions.
15 Number 1, it is basically subject to the judgment of
16 counsel for New England Compounding whether they want to
17 disclose certain things or not. They have worked with
18 us for months now, and they have disclosed some
19 documents, but it is ultimately subject to their

11:23AM

20 determination as to whether and how much they want to
21 respond to our requests because it is informal, and the
22 second thing is that the plaintiffs' steering committee
23 feels very strongly that the information we're getting
24 is very limited, and it is also struck subject to
25 certain confidential or protective probations that were

1 part of our agreement for the informal discovery, so
2 we're limited in what we can do with it and who we can
3 share it with at this point.

4 MS. PARKER: I will add also, your Honor,
5 that as part of the raid on NECC by other government
6 entities, we understand that some materials that had
7 previously been in New England Compounding's possession
8 may no longer be in New England Compounding's
9 possession, and I don't intend to take a position one
10 way or the other as to whether that's true, but it
11 certainly is a concern that I think everyone is
12 sensitive to here.

11:24AM

13 THE COURT: All right. Moving onto I guess
14 it's a jurisdictional question as to whether or not the
15 District of Massachusetts can enforce subpoenas. Having
16 read the cases, and perhaps you all can tell me,
17 otherwise I did not read any cases that were decided in
18 the context of an MDL.

19 MR. FENNELL: Your Honor, I guess initially
20 I'd like to point out, I think Judge Saylor already
21 issued an order on enforcement of the subpoenas. I
22 believe his ruling was that he is permitted to enforce
23 them, and that is in document Number 377.

11:24AM

24 MS. PARKER: Sorry, Judge Saylor ordered
25 from the bench during a status conference that all

1 objections concerning jurisdiction or centralized
2 authority of this Court to issue or enforce subpoenas
3 would be denied, and that's noted in docket Number 340,
4 which is the electronic's clerk notes from the July 18,
5 2013 status conference.

6 THE COURT: Thank you. I should have picked
7 that up. I appreciate that. All right. So those are
8 my questions. I'm going to start with any -- did you
9 have something to add on that issue?

11:25AM 10 MR. FENNELL: No, your Honor. Actually I
11 would like to have an opportunity to respond briefly on
12 some of the relevance.

13 THE COURT: What I would like to do is open
14 it up to any of the respondents to talk about any issue
15 that I haven't addressed or that we have addressed that
16 they would like to add anything to, and then I'll come
17 back to you for the last word on everything.

18 All right. So, yes.

19 MS. MARZULLO: This is Michelle Marzullo
11:26AM 20 with Baltimore Pain Management Center. One of the
21 questions that you asked and then moved forward on, why
22 was the protective order not sufficient to protect
23 against the production of corporate documents I believe
24 is what you asked.

25 It's my understanding that the order, with

1 the protective order, if we're both referring to the
2 same document, which is document 192 is what I'm
3 referring to. It's called order granting plaintiffs'
4 leave to serve subpoenas and qualified protective order
5 regarding protection of health information.

6 The way that I read that order was that the
7 qualified protective order was only regarding the health
8 information and did not cover corporate documents or the
9 relevancy thereof, and so, again, I go back to the
10 question of whether or not the corporate documents are
11 relevant.

12 THE COURT: I believe there was also an
13 amended stipulated protective order of confidentiality
14 at Docket Number 397. So I think -- in terms of the
15 business and proprietary information, I was wondering
16 why that wouldn't be protected by Docket Number 397.
17 You're correct that there's also 192, but you're right,
18 I took that as being particular to the health
19 information.

20 MS. MARZULLO: Thank you, your Honor. 397
21 I'm not prepared to discuss. Thank you.

22 THE COURT: Do any other respondents want to
23 speak about issues in general? Yes, I'll take you.
24 Just for purposes of the record, let me clarify that
25 when I asked questions before, I moved on because there

1 was no one that indicated that they wanted to respond to
2 it. Yes.

3 MR. ALTHAUSER: Your Honor, Tom Althausen.
4 I just want to make sure that at this point you wanted
5 to open it up for anything else that was on the chart?

6 THE COURT: Yes.

7 MR. ALTHAUSER: Thank you. My client,
8 Hartford County Ambulatory Surgery Center is actually in
9 a unique position with regard to these objections. My
10 client, I should say, is the only one that is in
11 Categories VI TU at page 20 of the chart, and I'll be
12 very brief with this.

13 What happened is that my client is served
14 with a subpoena. I had many things that gave me pause
15 over this subpoena. I sought to comply with the local
16 rule of this Court, which I knew there had to be one
17 since every other Court has it, and I tracked it down.

18 I was unable to confer with counsel. I then
19 was forced to file an objection. To this very day,
20 there has been nothing filed in court, in this court
21 responding to my objections. There was no mention of my
22 client specifically, there was nothing ever filed, there
23 was no mention of my client whatsoever with his
24 objections, and they're consolidated, and the subpoena
25 should be quashed in its entirety as to my client for

1 that reason.

2 The corporate documents is a perfect
3 example. I may have been able to reach some sort of
4 agreement with counsel prior to filing the motion with
5 regard to scope of corporate documents, and I could
6 continue on and on and on with the list, but as to my
7 client, it should be quashed in its entirety for that
8 reason.

9 THE COURT: Are you saying that you have
10 distinctive arguments from the other respondents that
11 have not been addressed in general?

12 MR. ALTHAUSER: No, your Honor, the
13 insurance -- I have waited on the insurance, it was a
14 distinctive argument that I made, but, in addition, in
15 my mind it should be quashed in its entirety as to my
16 client for the failure to be able to comply with the
17 local rule.

18 THE COURT: Thank you. Anyone else?

19 MS. DOUGHERTY: Your Honor, if I may briefly
11:30AM 20 respond. This is Kim Dougherty from Janet, Jenner &
21 Suggs. My office has reached out to counsel for Harford
22 who just spoke. We e-mailed, we called, so we did make
23 efforts to work out any objections that he had to the
24 subpoenas, client had to the subpoenas. We made the
25 efforts to do so. We were unable to actually reach him

1 or get a response, and it was our understanding that the
2 omnibus response that was filed by the plaintiffs'
3 steering committee was going to apply to all of the
4 objections that have been made by all of the clinics
5 rather than doing individual responses to everyone.

6 THE COURT: Briefly.

7 MR. ALTHAUSER: Yes, your Honor, I will be
8 brief because that's not accurate. I, as is clear in my
9 motion that I filed, sent an e-mail, I made a phone
10 call, I sent a letter. None of them were responded to,
11 at which point I had no choice whatsoever but to have to
12 file a motion to quash the subpoena in its entirety, so
13 the comments that anything that I was contacted
14 afterwards is totally irrelevant to that point.

15 THE COURT: All right. Thank you. Any
16 other respondents? Yes, I'm sorry, I did say you could
17 go next.

18 MR. TARDIO: Thank you, your Honor.
19 Chris Tardio on behalf of five Tennessee parties and
20 nonparties. I just want to make three very direct and
21 concise points that I don't believe have been addressed
22 or made yet. First, specific to Tennessee, as I
23 understand it from the statements of plaintiffs'
24 counsel, one of the intentions of the subpoenas to
25 nonparties is to "establish the standard of care for

1 parties in the litigation."

2 Tennessee has specific case law,
3 *Lewis v. Brooks* is the name of the case, I don't have
4 the cite from memory, but persons not involved in the
5 care at issue cannot be compelled to give expert
6 testimony. That's what the case says, and that's the
7 law in Tennessee, and as I understand from the
8 statements of counsel, that's the intention to use
9 nonparty subpoenas to establish the standard of care.

11:32AM

10 Tennessee also has ample case law that says
11 other people's personal practice does not set the
12 standard of care, the standard of care is set by expert
13 testimony, so, respectfully, on the relevance argument,
14 specific to Tennessee, that's an improper use of a
15 nonparty subpoena.

16 Secondly, as it pertains to Chattanooga
17 Neurosurgical Group, Howell Allen and Dr. Jones, three
18 of my clients, the original enforcement order was
19 limited to purchasers of product. Those three entities
20 did not purchase product, and we filed affidavits to
21 that effect, and I believe, respectfully, the subpoenas
22 to those entities that did not purchase product are, 1,
23 improper; and, 2, outside the scope of the order that
24 originally allowed the PSC to issue subpoenas.

11:33AM

25 Thirdly, specific to two of my other

1 clients, three, I'm sorry, Howell Allen, St. Thomas
2 Outpatient and Specialty Surgery Center, all three of
3 those entities are now parties to the MDL. They weren't
4 when the subpoenas were originally issued, but they are
5 now party defendants to cases in the MDL, and we've
6 cited in papers that at least as I read the District
7 Court opinions coming from the District of
8 Massachusetts, a Rule 45 subpoena is not the way you
9 discover information from a party, and for that reason,
10 respectfully, your Honor, I request that the subpoenas
11 to those three now parties be quashed and discovery of
12 those parties proceed under Rule 34, which is the way
13 that as I read the District Court rule orders it has
14 been done.

11:34AM 15 THE COURT: My understanding is that you've
16 already received as now parties Rule 34 requests; is
17 that correct?

18 MR. TARDIO: Yes, we have received --

19 THE COURT: And are they identical or
11:34AM 20 they're different to the Rule 45 requests?

21 MR. TARDIO: They're different. I'm mean,
22 they cover a lot of the same issues, and I'm sure some
23 of the documents will fall under both, but they are not
24 identical.

25 THE COURT: Any other respondents, yes?

1 MR. FIALKOW: Thank you. Again,
2 David Fialkow on behalf of the South Bend Clinic.
3 Judge, we had narrowed our issues and ordered that in
4 filing 451. There were two left. One was the insurance
5 piece. You've heard enough about that, we don't need to
6 speak to that, but the other point was one I started to
7 talk about earlier with regard to request Number 2.
8 That's a request where in the initial subpoena, it
9 sought any and all documents regarding the procurement
10 of MPA or a generic or name brand equivalents from
11 anyone other than NECC.

11:35AM

12 I want to leave apart the relevance point I
13 made earlier on. You're talking about getting
14 information from a nonparty, from what they bought from
15 a nonparty regarding a nonparty patient regarding a
16 noncontaminated drug and move on.

17 So what happened after our objection was, we
18 said -- we had a number of objections, but they came
19 back, and they limited the time scope of the period that
20 they were looking for, but they also said we're going to
21 clarify this and add three drugs.

11:35AM

22 Well, they weren't clarifying anything, they
23 were adding three different drugs that they wanted to
24 get, so what we wanted was the Court to say that the
25 original subpoena, what they asked for is what they're

1 entitled to get, but beyond that, again, those points
2 wouldn't be relevant, but the fact that they're also
3 asking for equivalence of drugs, that's where the burden
4 would come in, and that's where a 30-day compliance
5 would come in.

6 To determine the equivalent of the three
7 drugs, cardioplegia, betamethasone, and triamcinolone --
8 I can't pronounce the word, but to have to go through,
9 look through lists of drugs, then make a determination
10 as to whether or not it's equivalent, and then go ahead
11 and produce it would be extremely burdensome, especially
12 considering the fact that it's coming from, it's
13 purchased from an entity that isn't even a party to the
14 case regarding a patient who isn't a patient in the case
15 and involves a drug that wasn't even contaminated.
16 Those are our points.

17 THE COURT: Thank you. Anyone else? Yes.

18 MR. KIRBY: Your Honor, Greg Kirby again,
19 this time on behalf of SurgCenter of Bel Air. I just
20 wanted it to be noted for the record, I recently began
21 representing SurgCenter of Bel Air. Once that happened,
22 I filed a motion of limited appearance just for the
23 point of objecting to the subpoena, filed the motion to
24 quash, and Judge Saylor's law clerk was helpful in that.

25 I'm not admitted here in the District of

1 Massachusetts, nor do I have an efilings log-in. I've
2 had some issues getting that. The point is I'm not on
3 the objection chart. SurgCenter of Bel Air is not
4 listed on the objection chart. It's a little hard to
5 follow. I've got several different copies, and I'm not
6 sure which one is the current one, but, in any event, I
7 just wanted to make sure that I'm covered by filing the
8 motion to quash. I'm in the same position, I'm a
9 nonparty subpoena recipient similar to Ms. Humphrey.

11:37AM

10 None of the patients are parties, no one is
11 injured, very limited scope, so I would just ask that
12 you consider the motion I filed even though I'm not on
13 the objection chart.

14 THE COURT: All right. Thank you. Anyone
15 else? Yes.

16 MR. HILLMAN: Your Honor, Ben Siracusa
17 Hillman for Dr. O'Connell's Pain Care Centers. Just
18 briefly to touch on a couple of issues that came up and
19 then a procedural issue. One, with regard to
20 attorney-client privilege our view is that at the time
21 of production, if it is ordered, a privilege log would
22 be, you know, created if in fact any responsive
23 documents to whatever the ultimate --

11:38AM

24 THE COURT: The hard thing for me now is I
25 don't even think I have categories, I think people just

1 raised the objection. There's no examples. Given
2 obviously the specific documents, you may not be able to
3 identify until you actually go through each document for
4 the production, but if I remember correctly, it was sort
5 of I don't know want to say generic. I think there was
6 more than that, there was probably case law, but I don't
7 think there was a lot else in those objections.

8 MR. HILLMAN: Yes, I understand. I think
9 from our perspective, a specific ruling on
10 attorney-client privilege would not necessarily make
11 sense at this point, but that there may ultimately be --

12 THE COURT: You're preserving it?

13 MR. HILLMAN: Yes, we'd like to preserve
14 that, thank you. The second issue, there was some
15 question about burden and no clinic raising burden. I
16 mean, we've -- for our clinic in particular, and I
17 imagine for others as well, for us it would be
18 redactions of documents that are stored electronically
19 and in paper to remove patient identifying information
20 or other protected health information.

21 That itself is a vastly time-consuming
22 process. Obviously errors in that process subject us to
23 legal exposure and complaints from our patients if we're
24 releasing patient identifying information, and that has
25 been one of our primary concerns throughout this whole

1 process that patients who are, you know, nonparties, not
2 plaintiffs, were not injured, you know, having their
3 patient information turned over and exposed.

4 Finally, just on the procedural matter, you
5 had asked the PSC to file a, you know, a document with
6 the Xs that we're all familiar with. We had e-mailed
7 the plaintiffs' steering committee with our list of the
8 relevant Xs. Three of those on our list were not
9 included, so we had filed a pleading document, 532,
10 indicating, you know, what additional Xs should be
11 marked, and in the latest chart, those are still not
12 marked, so we just wanted to call your attention to
13 that, and also, similarly, the plaintiffs' steering
14 committee filed a pleading, Document 544 where they
15 noted with regard to us, and perhaps other clinics as
16 well, that certain objections were not made in our
17 initial filings, and, therefore, were untimely and
18 should not be considered.

19 We would submit that of the five that they
20 identify with the exception of the attorney-client
21 privilege issue, which we did not specifically raise,
22 the other four, all of them were raised in our pleading,
23 Document 311 at pages 712 and 13 essentially, and so we
24 just, you know, would like to make that record. Thank
25 you.

1 THE COURT: All right. Other respondents?
2 Yes.

3 MR. MOYERS: Your Honor, Adam Moyers for
4 Surgical Center of Wilson, North Carolina. I just
5 wanted to touch very briefly on the burden issue. You
6 mentioned that no one gave specifics, but the issue with
7 burden is the weighing of the relevance of the material
8 requested vs. the burden, particularly on nonparties
9 like my client who has no patients who are parties, no
10 patients who are plaintiffs, no patients who have sent
11 any letter of representation to us in any way.

11:41AM

12 The courts throughout the country, both
13 here, down in the Fourth Circuit, where I'm from, even
14 as far out as California have recognized that with
15 nonparties, that burden carries a specific weight, more
16 so than with a party, and now that we've heard what the
17 relevance is according to the plaintiffs' steering
18 committee that there may be other patients out there
19 that they are attempting to establish some kind of
20 nebulous standard of care, I would highlight to the
21 Court that for a small rural clinic like Surgery Center
22 of Wilson and some of the other clinics here, that
23 burden of responding relative to their size far, far
24 outweighs the very tenuous relevance theory that we've
25 heard here today, and I would just ask the Court to just

11:42AM

1 deeply consider the burden on those small clinics.

2 THE COURT: Thank you. Next.

3 MS. HUMPHREY: Your Honor, Kathryn Humphrey,
4 I'd like to add one thing to something that Mr. Fialkow
5 said when he was talking about Category Number 2 in the
6 revised subpoena and the request for equivalents to MPA,
7 and I thought it might be useful to the Court to know
8 that there are, for example, at least five equivalents
9 to generic MPA, so that addition by them of the
10 equivalent nexus increases the burden on all of our
11 hospitals and clinics in the Court orders' production
12 greatly to look for and then to provide, and I gave you
13 the example of how little of the NECC product my
14 hospital bought. A hospital that bought very little
15 from NECC may have bought a great deal of some other
16 type of drug. The relevance is nil, and the burden is
17 great.

11:43AM

18 THE COURT: Thank you. Any other
19 respondents? All right. The PSC, actually, if you
20 could also address the issue that's been raised about
21 the equivalents relevancy.

11:43AM

22 MR. FENNELL: Yes, your Honor. I'd like to
23 begin, if it pleases the Court, with just some general
24 comments about relevance and just first say that getting
25 back to the argument that was first presented by myself

1 and Ms. Parker. We're trying to prove a case against
2 New England Compounding Center, against its affiliates
3 and against its insiders.

4 Without a complete picture of what was done
5 in terms of marketing through all of the clinics that
6 purchased this drug, without a big picture in terms of
7 what the administrative aspects were in terms of
8 communications between New England Compounding Pharmacy
9 and these healthcare providers who were purchasing the
10 drug, whether the healthcare providers were negligent or
11 not negligent or liable in some other way or not,
12 whether they had -- whether they have sick patients or
13 not, this is the kind of picture that the plaintiffs'
14 steering committee and other plaintiffs are going to
15 need to establish this liability case.

16 We don't -- the master complaint has just
17 been filed. We can anticipate that there are going to
18 be all kinds of defenses coming out of the woodwork from
19 New England Compounding and from the affiliates and the
20 national defendants and everybody, and without this big
21 picture, we're not going to be able to respond to those
22 defenses as completely as we should be allowed to.

23 Just to be specific, there are detailed
24 requirements in many states about whether or
25 not -- about how to procure drugs from a compounding

1 pharmacy. Some states require that it be done pursuant
2 to a specific, individual prescription for each patient,
3 and so whether or not New England Compounding Pharmacy,
4 you know, was complying with that requirement across the
5 board with all of these healthcare providers is
6 something that the plaintiffs' steering committee simply
7 needs to know to prosecute its cases.

8 Compliance in general with state and federal
9 regulations is something that the plaintiffs' steering
10 committee is going to have to know. Likewise, in terms
11 of recalls, what did these clinics -- if clinics who
12 aren't on the radar because they have no plaintiffs and
13 no injured patients, if they had specific knowledge
14 about a drug that they had a problem with or found out
15 about and sent notifications back to New England
16 Compounding Pharmacy about it, that's clearly relevant
17 to this case.

18 So there's a lot of information that these
19 clinics can provide the plaintiffs' steering committee
20 and should provide the plaintiffs' steering committee
21 that will be highly relevant to our case against NECC
22 and its affiliates.

23 One of the attorneys raised the restaurant
24 analogy about somebody who got food poisoning in a
25 restaurant in Boston, and I would submit to the Court if

1 that one restaurant purchased from the same food
2 distributor as a dozen other restaurants in Boston, and
3 there was an outbreak that resulted in 70 deaths and 800
4 injuries, the documentation of the purchase and
5 acquisition of food from that one food distribution
6 company to 12 other restaurants who don't have any
7 injuries, I would submit to the Court would be highly
8 relevant to a case like that.

9 With respect to request Number 2, which is
10 the inquiry into the equivalents to MPA, the reason that
11 that was put in on a subpoena specifically was there's
12 been information out there that New England Compounding
13 Pharmacy was able to sort of take advantage of a market
14 that was identified for preservative-free
15 methylprednisolone acetate, that it was a drug that they
16 couldn't find anywhere else, the healthcare providers
17 couldn't find anywhere else, so they went to New England
18 Compounding Pharmacy.

19 The lack of equivalents or presence of
20 equivalents could be relevant to this case for reasons
21 having to do with procurement, for reasons having to do
22 with pricing, having to do with availability of the MPA,
23 the preservative-free form.

24 In addition to that, as far as I can tell,
25 none of the clinics or healthcare providers responding

1 to the subpoenas specifically made the objection that
2 the equivalents requirement in the subpoena was
3 burdensome. Plenty of them made objections because of
4 burdensome, but I'm not sure, I would submit to the
5 Court that some of them probably mentioned this in their
6 discussion, but they didn't raise a specific objection
7 just to the equivalents thing.

8 Responding to Mr. Althausen's comments about
9 I believe he said that he was unable to confer. I,
10 myself, have responded to dozens of phone calls from
11 many healthcare providers about the subpoenas. In
12 addition to my efforts, there have been a number of
13 attorneys not on the plaintiffs' steering committee but
14 helping the plaintiffs' steering committee out very
15 diligently, and to my knowledge I just can't imagine
16 somebody receiving a call from a clinic who wants to
17 discuss, meet and confer about the subpoena and not
18 getting a call back or being unable to confer, it just
19 doesn't sound plausible to me.

11:49AM 20 With respect to Mr. Tardio's comment about
21 the standard of care under Tennessee law, my
22 understanding of that law is that it applies only to
23 medical malpractice, and I'm not sure exactly what the
24 the scope of that law is, but there are many reasons why
25 the plaintiffs' steering committee in this case will

1 have to establish a standard of care in many different
2 contexts other than strictly medical malpractice.

3 Finally, I just wanted to add some comments
4 about burden. Obviously the Court has to weigh the need
5 for the information that the plaintiffs' steering
6 committee has requested against the burden on the
7 claimants. I would suggest to the Court that as far as
8 I can tell, there's so many, it's hard for me to
9 remember everything, but I don't remember any healthcare
10 provider coming back to us and specifically identifying
11 a burden that was inherent in the production of these
12 documents other than to say it is a big burden.

11:50AM

13 For example, the argument was made today
14 that redaction of documents could be a big burden. We
15 have no idea what the volume of documents we're talking
16 about are or specifically what that burden is. We don't
17 know whether we're talking about 10,000 pages of
18 documents or a million pages of documents, so those
19 objections haven't been made sufficiently for the PSC to
20 be able to respond in a meaningful way to a specific
21 objection, and I think given the late hour, it's time
22 for the clinics and the healthcare providers to just
23 start producing the documents.

11:51AM

24 The plaintiffs' steering committee has bent
25 over backwards over the last several months to, A,

1 reduce the scope of the original subpoena in the form of
2 several what we called accommodations to limit the scope
3 of the production required, to eliminate the deposition
4 thing and to address many clinics' concerns about not
5 having enough time to respond.

6 We have been on the phone with lots of
7 healthcare providers and worked out our differences, and
8 we've been willing to do that for a long time, but we've
9 been going at this for four months now.

11:52AM

10 What it really comes down to burdenwise is
11 that 800, probably more, people have been seriously
12 injured as a result of this case. Close 70 people have
13 died as a result. Ultimately the burden is spread out
14 amongst 75 to 80 clinics to help the plaintiffs'
15 steering committee develop the picture that we need to
16 prosecute this case against New England Compounding
17 Pharmacy and the affiliates, and we submit to the Court
18 that under the circumstances of that, of this case, that
19 burden is very reasonable, and I think that's all I have
20 to say unless Ms. Parker has anything to add.

11:53AM

21 MS. PARKER: Just quickly, your Honor, as we
22 all know, the Federal Rules permit plaintiffs to take
23 discovery of third parties and nonparties for purposes
24 of collecting evidence relevant to proving their case
25 against another.

1 Mr. Fennell and I have given you both today
2 in our argument and in our briefing our best effort to
3 explain to this Court and these clinics why this
4 information is relevant to proving plaintiffs' cases.
5 We've also taken precautions to put in place protective
6 orders to ensure that both patient information and
7 confidential business information is treated
8 accordingly.

9 These clinics by and large admit that
10 they've purchased, received and injected their own
11 patients with contaminated products manufactured by
12 New England Compounding Company. They're now apparently
13 unwilling to help the plaintiffs' steering committee
14 prosecute its case against NECC.

15 Clinics have made burden arguments and we
16 leave it to you, to this Court, to evaluate whether the
17 showing they have provided on those allegations of
18 burden is sufficient, but we note the clinics should not
19 be able to avoid producing discovery that is relevant to
20 proving the cases against New England Compounding
21 Company and the affiliated defendants simply because
22 they have not been sued yet. Thank you.

23 THE COURT: Thank you. That was all very
24 helpful. I don't know if I'll see you again, but thank
25 you very much.

1 THE CLERK: All rise. Court is in recess.
2 (Whereupon, the hearing was adjourned at
3 11:54 a.m.)
4

5 C E R T I F I C A T E
6

7 UNITED STATES DISTRICT COURT)
8 DISTRICT OF MASSACHUSETTS) ss.
9 CITY OF BOSTON)
10

11 I do hereby certify that the foregoing
12 transcript, Pages 1 through 61 inclusive, was recorded
13 by me stenographically at the time and place aforesaid
14 in MDL NO. 13-02419-FDS, IN RE: NEW ENGLAND COMPOUNDING
15 PHARMACY CASES LITIGATION and thereafter by me reduced
16 to typewriting and is a true and accurate record of the
17 proceedings.

18 Dated this November 14, 2013.

19 s/s Valerie A. O'Hara
20

21 _____
22 VALERIE A. O'HARA

23 OFFICIAL COURT REPORTER
24
25